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No. 93-1769

In The

Supreme Court of the United States

October Term, 1993

SCHOOL DISTRICT No. 1J,
MULTNOMAH COUNTY, OREGON,

Petitioner,

vs.

ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS RESTATED

Fed. R. Civ. P. Rule 56(e) requires that affidavits submitted in opposition to a motion for summary judgment must be of a particular "form and content" – i.e., "made on personal knowledge"; "set forth such facts as would be admissible in evidence"; "show affirmatively that the affiant is competent to testify"; "attach thereto or serve[] therewith" "[s]worn or certified copies of all papers or parts thereof referred to. . . . "

The district court in this case found that petitioner's affidavits did not comply with the last of these affidavit content requirements and the court of appeals upheld the district court's summary judgment dismissals as a permissible exercise of discretion on the facts of this case.

QUESTIONS:

1. Should noncompliance with Rule 56 continue to be dealt with in the exercise of trial court discretion, as under current law and this case, or should district judges be compelled by appellate edict to consider, in opposition to summary judgment motions, affidavits that violate the express "form and content" requirements laid down in Rule 56(e), as petitioner urges?

2. Should this Court grant certiorari where petitioner has not identified any conflict between the circuits or any important question of federal law that warrants review by this Court and where petitioner only challenges a discretionary ruling by the district court?

PARTIES TO THE PROCEEDING

Petitioner School District No. 1J, Multnomah County, Oregon ("petitioner") was the plaintiff and appellant below. The following parties were defendants and appellees below: Armstrong Cork/Armstrong World ("Armstrong"); Fibreboard Corporation ("Fibreboard"); the Flintkote Company ("Flintkote"); Keene Corporation ("Keene"); Owens-Corning Fiberglas ("OCF"); and United States Gypsum Company ("U.S.G.") (collectively "Respondents").

Fibreboard Corporation is a parent company to five wholly-owned subsidiaries. All shares of stock issued to the public have been issued by Fibreboard under the name Fibreboard Corporation.

Imasco Limited is the parent company (owner) of The Flintkote Company.

Armstrong World Industries, Inc. is the parent corporation of Armstrong Cork Company; Armstrong World Industries, Inc. has no domestic subsidiaries that are not wholly owned.

United States Gypsum Company is a subsidiary of USG Corporation; United States Gypsum Company has no subsidiaries.

Owens-Corning Fiberglas has no domestic subsidiaries that are not wholly owned.

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner's statement concerning the opinions below is incomplete. The Ninth Circuit's opinion (reprinted in

Petitioner's Appendix 9-37) is reported at 5 F.3d 1255.[1] The decision of the District Court granting summary judgment (Pet.App. 52-74) is reported at 767 F.Supp. 1051. The decision of the district court denying petitioner's motions for rehearing and reconsideration (Pet.App. 38-51) is reported at 139 F.R.D. 164.

JURISDICTION

Petitioner's jurisdictional statement is partially inaccurate. The opinion of the Ninth Circuit was filed on September 24, 1993, not September 22.

STATEMENT OF THE CASE

Petitioner filed a complaint claiming that 105 or more of its buildings in Multnomah County, Oregon were damaged by asbestos products. Pet.App. 18. Petitioner sued each of the respondents (six in number) and others, claiming that each was liable in tort under Oregon law for asbestos-containing products allegedly installed in its buildings. Many years ago, respondents manufactured products that contained asbestos, and some of those products were amenable to use in building construction.

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[1] Petitioner's Appendix will be cited in this brief as "Pet.App." The copy of the Ninth Circuit Opinion included in Pet.App. is missing page 11118 (*see* Pet.App. 31-32). That page is included as Respondents' Appendix 1, which is bound following this brief.

Emphasis has been added in quoted material unless otherwise indicated.

Under Oregon tort law, petitioner had the burden of proving the causal connection between each manufacturer's asbestos-containing products and any injury claimed to result from the installation of such products in a particular building. *See Senn v. Merrill-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988).

Respondents each filed a motion for summary judgment. This Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), allows a defendant to move for summary judgment on the basis that the plaintiff cannot adduce evidence necessary to support one or more essential elements of the plaintiff's *prima facie* case. Accordingly, respondents sought summary judgment on the basis that petitioner lacked evidence showing that asbestos-containing products manufactured by respondents had been installed in particular buildings included within the 105 described in the complaint. Pet.App. 22. Those "rounds" of summary judgment motions were filed after the conclusion of many months of product identification discovery. The district court's rulings on summary judgment were not made in isolation. They were preceded by petitioner's repeated failures to simply and specifically identify each respondent's alleged asbestos-containing products in its buildings, despite a number of court orders requiring petitioner to do so.

First, petitioner did not respond substantively to respondents' joint interrogatories requesting specific product identification at each building. As a result, respondents sought a discovery management conference and an order compelling interrogatory answers. (CR

#118).[2] Second, after the discovery conference, the district court ordered petitioner to provide specific product identification information for each building. (SER 1-2, CR #131).[3] Third, after petitioner again sought to avoid the obligation of answering the interrogatories, the district court, by second order, *again* directed that petitioner provide complete and accurate answers to the interrogatories. (SER 6, 10-11, CR #154). Finally, upon later granting petitioner additional months to answer the interrogatories, the district court warned petitioner in a third order that "[n]o further extensions will be allowed absent extraordinary circumstances." (SER 13, CR #163). After the final cutoff for petitioner's interrogatory responses, respondents filed their summary judgment motions for dismissal for lack of product identification.[4]

Under *Celotex* and Rule 56,[5] once respondents sought summary judgment, it was petitioner's burden to demonstrate the existence of a genuine issue of material fact preventing summary judgment. As applied in this case, this standard required a showing that respondents' products had in fact been installed in particular buildings. In the face of the summary judgment motions, petitioner could no longer rest on its cursory pleading that respondents were liable for buildings on an undifferentiated

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[2] "CR" refers to the Clerk's Record filed in the district court.

[3] "SER" refers to the Supplemental Excerpts of Record filed in the Ninth Circuit by respondents.

[4] A partial history of the case is included in the Ninth Circuit and district court opinions. Pet.App. 18-37, 52-74.

[5] All "Rule" citations are to the Federal Rules of Civil Procedure, unless otherwise noted.

basis. Rather, petitioner had to adduce "the kinds of evidentiary materials listed in Rule 56(c)" (*Celotex*, 477 U.S. at 324) in order to overcome respondents' motions.

Petitioner submitted affidavits of its attorney, Peter Preston, in an attempted discharge of its *Celotex* summary judgment burden. Those affidavits were all materially similar. Each recited that attorney Preston reviewed various documents in petitioner's files and found within those documents some referred-to parts thereof which (allegedly) indicated that particular brands of products may have been called for in some proposed construction specifications for particular buildings.[6] Pet.App. 24.

Rule 56(e) provides that any affidavit offered in opposition to a summary judgment motion *must* have attached to it "[s]worn or certified copies of all papers or parts thereof referred to in [the] affidavit . . . ." Petitioner concedes in this Court, as it has done below, that the Preston affidavits "do not fully comply with Rule 56(e) . . . ." Pet. 10. The documents or parts thereof referred to in the Preston affidavits were not attached thereto or submitted to the district court in opposition to respondents' motions. Thus, the contract documents, and particularly the pages of supposed brand specifications, relied upon by petitioner as the evidentiary basis to overcome respondents' summary judgment motions were not placed before the district court. Pet.App. 24-26.

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[6] Contrary to petitioner's statement of the case at Pet. 5-6, attorney Preston's affidavits and addenda did not state or show that particular products were actually "installed" in particular buildings.

The district court granted respondents' motions because the Preston affidavits did not comply with the Rule 56(e) document attachment requirement.[7] Absent the required documents, petitioner lacked competent evidence in opposition to respondents' motions for summary judgment.[8]

On appeal, the Ninth Circuit reviewed the district court rulings regarding the affidavits under an abuse of discretion standard and affirmed. The Ninth Circuit based its decision on several considerations. (1) "The context in which the district court ruled on the . . . motions [for summary judgment] . . . was preceded by a discovery battle" in which petitioner refused to respond to discovery identifying products installed in particular buildings and was ordered to make such discovery, but responded in a fashion less complete than the district court had specifically ordered. Pet.App. 23. (2) The documents omitted from the affidavits appeared to be the *only* evidence even potentially holding respondents in the case, and given the central importance of those alleged documents, petitioner's failure to attach them was remarkable. (3) Petitioner had demonstrated an ability to

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[7] Petitioner's opposition also did not comply with Local Rule 220-9(c) [formerly Local Rule 220-10(c)], which provided in pertinent part: "the filing party shall extract and highlight only the relevant portions of each referenced document. Photocopies of extracted pages, with appropriate identification and highlighting will be adequate."

[8] Pet.App. 26, 63-64, 65, 67, 68, 69, 71-72, 73-74. Furthermore, petitioner had stipulated at the hearing that the "record is closed today; there is no more supplementation by [petitioner's] counsel." SER 19; *see generally* Pet.App. 43.

submit relevant portions of similar documents when petitioner chose to do so, thus belying the contention that petitioner could not comply with the Rule 56(e) attachment requirement without undue burden. Pet.App. 26-27.

In the courts below, petitioner also challenged the district court's refusal to reconsider the affidavits subsequent to the summary judgment rulings, when petitioner filed more than 21,000 unindexed, unorganized pages of previously available alleged contract documents in the district court. The Ninth Circuit affirmed the denial of reconsideration as a legitimate exercise of discretion by the district court. Pet.App. 29-30. Petitioner does not seek review of that ruling in this Court.

REASONS TO DENY THE WRIT

This case does not meet the Supreme Court Rule 10.1(a) criteria for review. The law is uniform. There is no conflict. There is no legal issue of importance. Indeed, nothing in the law is currently unresolved.

Rule 56(e) provides that any affidavit filed in opposition to a motion for summary judgment *must* have attached to it sworn or certified copies of any portions of documents referred to in the affidavit. The plain wording of the Rule applies directly to the facts of this case. No court has suggested that the document attachment requirement of Rule 56(e) is inapplicable or overridden by other provisions of law, be they statutes, rules or decisions. The attachment requirement is basic and

mandatory; it means what it says.[9] While there are cases where courts have exercised discretion in various ways in addressing or remedying noncompliance with Rule 56(e), a conflict of decision requiring resolution by this Court does not exist. Those cases merely demonstrate application of judicial discretion by lower courts to the unique facts of each different case.

What should be relevant in this Court under Supreme Court Rule 10.1(a) is that no authority supports the argument that affidavits suffice to defeat summary judgment when they do not comply with Rule 56(e). Petitioner's argument can be summarized as follows: inadmissible, incompetent, noncomplying affidavits may be used to defeat summary judgment motions as a matter of law. Having set for itself this embarrassingly low standard of summary judgment practice, petitioner claims to have met this erroneous standard because petitioner's affidavits are inadmissible, incomplete, and non-complying.

In support of its argument, petitioner posits false conflict between Rule 56(e)'s document attachment

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[9] *See, e.g., Washington v. Maricopa County*, 143 F.2d 871, 872 (9th Cir, 1944), cert. denied, 327 U.S. 799 (1946) ("no sworn or certified copies of any such paper was attached to or served with either affidavit. Hence, all references to such papers should have been disregarded."); *Peterson v. United States*, 694 F.2d 943, 945 (3d Cir. 1982) (the attachment requirement is a "clear mandate" drawn from the "unambiguous language of the rule," and failure to attach key documents to affidavit violated Rule 56(e)); 10 A, Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2722, at 57-58 (1983) ("if written documents are relied upon they actually must be exhibited; affidavits that purport to describe a document's substance or an interpretation of its contents are insufficient").

requirement, Rule 56(c), and *Celotex*. But neither *Celotex* nor Rule 56(c) espouses the rule that deficient affidavits must be considered in opposition to summary judgment even when they violate Rule 56 itself.

Rule 56(c) sets forth the various types of evidentiary materials that may be proffered in opposition to summary judgment. Rule 56(c) is not in conflict with Rule 56(e). The two Rules are complementary. Rule 56(c) mentions affidavits; Rule 56(e) governs their "form and content." An affidavit lacking the "form and content" required by Rule 56(e) is no longer an "affidavit" within the contemplation of Rule 56(c). In addition, Rule 56(c) does not deal at all with the admissibility of an affidavit under the Federal Rules of Evidence. Insofar as admissibility is addressed, Rule 56(e) requires that affidavits show: affiant's competence, personal knowledge, and "such facts as would be admissible in evidence."

Contrary to petitioner's erroneous argument, this Court's decision in *Celotex* does not even address the Rule 56(e) document attachment requirement. Thus, *Celotex* could hardly be inconsistent with the lower court decisions to enforce Rule 56(e) based on the facts and history of this case.

Apart from a lack of legal merit, this Court should deny certiorari because the rule petitioner seeks is inimical to the administration of justice. Petitioner would turn the requirements of Rule 56 into mere aspirations. But if noncompliance with Rule 56 carries little penalty, as petitioner would have it, deficient submissions will become more prevalent. Rather than take away penalties for deficient practice, the better course is to leave the whole matter of noncompliance and penalty to the discretion of the trial judge.

Petitioner points out the value of summary judgment in getting to the merits of cases and weeding out cases that lack issues for trial. Pet. 9-10. But the requirement that the relevant portions of important documents be placed before the court, and not shielded behind a veil of affiant characterization, precisely furthers the goal of resolving cases based on the *evidence*.

Rule 56(e) helps implement this Court's decisions in *Celotex*, *Matsushita*, and *Liberty Lobby*.[10] Those decisions require that a plaintiff demonstrate an ability to introduce evidence on matters of fact as to which the plaintiff would have the burden of proof at trial. Rule 56(e) performs the complementary function of requiring a plaintiff to showcase the documentary evidence in cases where the plaintiff's proposed proof consists of documentary evidence. Neither *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77 (5th Cir. 1987), nor *Jackson v. Mississippi*, 644 F.2d 1142, 1144 (5th Cir. 1981) (Pet. 11), is to the contrary. Indeed, neither involved the issue presented here. *Lodge Hall* did not involve or address the attachment requirement. It involved whether verified pleadings could be considered by the court in lieu of affidavits. In *Jackson*, the referenced documents were attached to the party's attorney's affidavit; there, the issue was whether the attorney was competent to testify as to matters stated in the attachments.

Petitioner contends that the Preston affidavits "set forth sufficient evidence to avoid summary judgment" (Pet. 10) and that "no doubt evidence exists to avoid

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[10] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

summary judgment." *Id.* The court of appeals correctly answered those grandiose assertions: "Lacking [the alleged referred-to documents], Preston's affidavits were nothing more than an attorney's argument lacking evidentiary support." Pet.App. 26.

CONCLUSION

The petition should be denied.

DATED: June 1, 1994

Respectfully submitted,

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APPENDIX

made no finding that the affidavits filed by the School District were or were not "sham" affidavits generated soley in order to create a genuine issue of material fact.

[8] However, this is not the end of our analysis. Summary judgment is not precluded simply because there is a dispute of some facts in a case. To defeat a motion for summary judgment, the nonmoving party must present facts in support of the issues on which it would bear the burden of proof at trial, there must be probative evidence of those facts, and the facts must be uncontroverted or at least create a *genuine* issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)). When "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat. Bank v. City Service Co.*, 391 U.S. 253, 289 (1968)).

[9] OCF and Fibreboard have requested summary judgment as to those schools where none of their products were identified at the School District's interrogatory response. The response is powerful evidence that neither Fibreboard nor OCF asbestos-containing products are in those schools. We examine the affidavits presented by the School District to determine if the affidavits, considered together with the School District's contrary interrogatory

response, present a *genuine* factual dispute of a material issue.

The School District contends that an OCF asbestos product was installed at Edwards school. It relies on the affidavit of Robert Kramer, an asbestos worker who recalls installing an OCF asbestos product at Edwards. Kramer's affidavit, however, is based on his distant memory. More significantly, it ever contradicts the School District's interrogatory response which was based on the School District's examination of applicable

* * *